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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GLOBAL STARS INVESTMENT, INC., Plaintiff and Appellant, v. GIN WONG ASSOCIATES, LLC, Defendant and Respondent.	B211076 (Los Angeles County Super. Ct. No. BC383395)

APPEAL from an order of the Superior Court of Los Angeles County. Ronald M. Sohigian, Judge. Dismissed.

Law Offices of Dennis P. Block & Associates, Dennis P. Block and John H. Greenwood for Plaintiff and Appellant.

Schwartz & Janzen, Steven H. Schwartz and Noel E. Macaulay for Defendant and Respondent.

Plaintiff and appellant Global Stars Investment, Inc., purports to appeal from a trial court order sustaining the demurrer of defendant and respondent Gin Wong Associates with leave to amend. Because appellant did not challenge an appealable order, we dismiss the appeal.[1]

FACTUAL AND PROCEDURAL BACKGROUND

"Because this matter comes to us on demurrer, we take the facts from plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether the plaintiff has stated a viable cause of action. [Citation.]" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.)

According to appellant's complaint, appellant leases certain property to respondent and Mid Wilshire Associates (Mid Wilshire).[2] Appellant and respondent's lease provides, in relevant part: "If either party . . . named herein bring[s] an action to enforce the terms hereof or declare rights hereunder, the prevailing party in any such action, trial or appeal thereon, shall be entitled to his reasonable attorneys' fees to be paid by the losing party as fixed by the court in the same or a separate suit, and whether or not such action is pursued to decision or judgment." Similarly, appellant's lease with Mid Wilshire provides, in relevant part: "If any Party . . . brings an action or proceeding involving the Premises whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. Such fees may be awarded in the same suit or recovered in a separate suit, whether or not such action or proceeding is pursued to decision or judgment."

When respondent and Mid Wilshire failed to pay rent for the property for July 2006, appellant sued them for eviction based upon nonpayment of rent. On April 19, 2007, judgment was entered in favor of appellant and against respondent and Mid

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[1] Our opinion here renders respondent's motion to dismiss filed on October 29, 2009, moot.

[2] Mid Wilshire is not a party to this appeal.

Wilshire. Neither respondent nor Mid Wilshire paid appellant the attorney fees it incurred in the unlawful detainer actions.

Thus, on January 7, 2008, appellant filed the instant action solely to recover the attorney fees it incurred in the underlying unlawful detainer actions.

Respondent demurred, raising the following arguments: (1) This action is barred pursuant to Code of Civil Procedure section 1033.5 and California Rule of Court, rule 3.1702 by appellant's failure to seek its attorney fees in the underlying action; (2) appellant waived any right to recover attorney fees by failing to seek them in the underlying action; and (3) the instant action is barred by the doctrine of res judicata.

Appellant opposed the demurrer. It conceded that it failed to timely file a motion for attorney fees as a cost on the judgment. However, because the parties' lease specifically allows for a party to recover attorney fees in a separate action, appellant argued that it could seek attorney fees in this new, separate lawsuit.

After entertaining oral argument, the trial court sustained respondent's demurrer. It found that appellant "prayed for attorneys' fees in [the underlying unlawful detainer action], but did not do anything further to get such fees -- it did not file a memorandum of costs or make a motion for an award of attorneys' fees. . . . That is fatal to its efforts in the present case. Moreover, its present claim appears to be barred by res judicata." In so ruling, the trial court conditionally granted appellant leave to amend.

On September 24, 2008, appellant filed a notice of appeal from the trial court's July 8, 2008, order sustaining respondent's demurrer.

DISCUSSION

It is well-established that a party may only appeal from an appealable order. (Code Civ. Proc., § 904.1.) Code of Civil Procedure section 904.1 codifies the general list of appealable orders and judgments. No appeal may be taken from an order sustaining a demurrer. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695.)

Here, the trial court sustained respondent's demurrer with leave to amend. That order is not appealable. Our analysis could stop here.

Setting that aside, we could review the trial court's order sustaining the demurrer in conjunction with a proper appeal from a judgment or an order of dismissal. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1032, fn. 1.) "When a demurrer is sustained with leave to amend, and the plaintiff chooses not to amend but to stand on the complaint, an appeal from the ensuing dismissal order may challenge the validity of the intermediate ruling sustaining the demurrer." (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.)

Yet, appellant did not appeal from either an ensuing judgment or an ensuing order of dismissal. Rather, its notice of appeal provides that it is appealing only "from the order sustaining [respondent's] demurrer."

Liberally construing appellant's notice of appeal (Cal. Rules of Court, rule 8.100(a)(2)), we could deem the appeal as being from a final judgment or order of dismissal. (Cal. Rules of Court, rule 8.104(e).) But, appellant has not provided us with an adequate appellate record. In particular, appellant failed to include either a judgment or order of dismissal. (Cal. Rules of Court, rule 8.122(b)(1)(A) & (B) [clerk's transcript must contain a copy of the judgment or order appealed from]; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) Absent these critical documents, we lack jurisdiction to consider the merits of appellant's appeal.[3]

For the sake of completeness, even if we treat appellant's appeal as having been taken from a judgment and/or order of dismissal following the trial court's order sustaining respondent's demurrer with leave to amend, the appeal still fails.

Considering this issue de novo (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790), we conclude that appellant's request for attorney fees is barred by the doctrine of res judicata. "The doctrine of res judicata precludes the relitigation of certain matters which have been resolved in a prior proceeding under

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[3] Appellant did not ask, and we decline to treat this appeal as a petition for writ of mandate. (See, e.g., *Morehart v County of Santa Barbara* (1994) 7 Cal.4th 725, 744–747.)

certain circumstances. [Citation.] Its purpose is 'to preserve the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation.' [Citations.] [¶] The doctrine has two aspects. It applies to both a previously litigated cause of action, referred to as claim preclusion, and to an issue necessarily decided in a prior action, referred to as issue preclusion. [Citations.] The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]" (*Brinton v. Bankers Pension Services Inc.* (1999) 76 Cal.App.4th 550, 556.)

The defense of res judicata may be resolved on demurrer. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 324.)

With these principles in mind, we readily conclude that appellant's action is barred by the doctrine of res judicata. First, the issue of attorney fees was raised both in this action and in the unlawful detainer action. Second, according to appellant's verified complaint in this action, the prior proceeding resulted in a final judgment on the merits. Third, the parties in this action and in the prior proceeding are identical.

The fact that the parties may have agreed that they could seek attorney fees in a separate action does not change our analysis. The bottom line is that appellant did request attorney fees in the prior action, but did nothing to actually obtain an award of attorney fees. That judgment is final. The issue cannot be revisited in separate litigation.

DISPOSITION

The appeal is dismissed. Respondent is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD